FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 342

MADISON L. MILLER, Jr.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

I.

Opinions Below.

The trial court filed no opinion in this case, but the judge's view of the law is shown by his statement on directing a verdict for defendant (R. 16). The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 361.

II.

Jurisdiction.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sect. 347, having granted on De-

cember 3, 1934, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case. The judgment of the Circuit Court of Appeals to be reviewed was entered June 8, 1934.

III.

Statement of the Case.

Madison L. Miller, Jr., filed suit against the United States in the United States District Court for the Middle District of Georgia to recover total permanent disability benefits of $57.50 per month from October 26, 1918, payable under a contract of yearly renewable term insurance issued to him through the Bureau of War Risk Insurance about January 22, 1918, because of injuries received by him in a troop train wreck in France (R. 11).

Defendant admitted issuance of the policy, the payment of premiums continuing the insurance in force to May 31, 1919, the due filing of the claim, and that a disagreement had arisen (R. 11).

The only issue made upon the trial of the case was whether or not plaintiff became totally disabled while said insurance was in force by the payment of premiums, as counsel for defendant conceded in open court that plaintiff's injuries were permanent, but contended that they did not render plaintiff totally disabled within the terms and meaning of the insurance contract and the law (R. 11).

The evidence for plaintiff and the fair inferences therefrom show:

Plaintiff's right hand was badly mangled in a train wreck on October 26, 1918. At the same time he received injuries about the face and head. Two days later his right arm was amputated above the elbow. His left eye was defective from birth, and after his injury and while in the hospital in France he discovered that he could see only the outline

of large objects with his left eye. At that time he had only one-tenth vision in the left eye and no use of that eye; that its condition was then permanent and could not be corrected (R. 12, 15).

The extent of plaintiff's schooling was the third grade in high school. Prior to his enlistment he was a practical engineer, not a graduate engineer, and he could not do the engineering work for which he was trained after his injuries (R. 12-13).

Plaintiff's first job after he was discharged was given him out of sympathy and lasted only one month. He obtained several other jobs after this with different employers, but in each case after a short period of employment he had to give up these jobs because of his handicaps rendering him unable to do the work required (R. 13-14).

He then tried selling stocks on a commission, and worked at this for twenty-two months, but earned during the entire time only $105. In 1931 he tried selling goods for the Fuller Brush Company and worked at this from January until May and earned only $20. He has no talent for sales jobs. During the period from April, 1919, when he was discharged from the Army, to the date of the trial, July, 1933, he earned only $405 (R. 14-15.)

During the intervals between jobs plaintiff obtained and lost he tried diligently to get other employment, but could not in competition with others who had two hands and two good eyes (R. 14).

He was right-handed before his injury, and the loss of his right arm and his left eye rendered him much more seriously handicapped than if he had lost an arm and an eye on the same side (R. 13, 15).

The medical witness for plaintiff testified he knew of no gainful occupation plaintiff could follow, and that with the loss of his right arm and left eye he was totally disabled (R. 15).

Upon the conclusion of plaintiff's evidence counsel for defendant moved for a directed verdict on the following grounds:

> "(1) That the plaintiff has produced no substantial evidence to show that the insured was totally and permanently disabled prior to the lapse of his policy.
>
> "(2) Because it affirmatively appears from the plaintiff's evidence that the eye disability existed prior to the issuance of the War Risk Insurance sued upon, and because the remaining disability, to-wit, the loss of an arm, is not a total disability." (R. 16.)

Thereupon, the trial judge stated that he would overrule the second ground of the motion for directed verdict, and that he would take it as proven that the plaintiff had lost the use of his right arm and his left eye, and direct the jury to return a verdict for the defendant on the ground that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled. The verdict was so directed, and upon this verdict judgment was entered for the defendant against the plaintiff for costs (R. 17).

Upon the final judgment plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit. The appellate court affirmed the judgment of the District Court on June 8, 1934, and decided that subdivision 3 of Section 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473), was not applicable to war risk insurance; and that Regulation 3140 of the Veterans' Administration, providing that certain specific losses, among them the permanent loss of the use of a hand and an eye, shall be deemed total permanent disability under yearly renewable term insurance, was beyond the authority of the Director of the Veterans' Bureau, or the Administrator of

Veterans' Affairs, to issue, and not binding upon the courts; and that regulations aside, the evidence did not warrant a finding of total permanent disability (R. 27, 24, 25).

IV.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that subdivision 3 of Sect. 202 of the World War Veterans' Act of 1924, as amended (38 U. S. C. A., Sect. 473) is not applicable to war risk insurance.

(2) The Circuit Court of Appeals erred in deciding that Regulation 3140 of the Veterans' Administration was beyond the power and authority of the Director of the Veterans' Bureau (now Director of Veterans' Affairs) to make, and not binding on the courts.

(3) The Circuit Court of Appeals erred in deciding that regulations aside, the evidence did not warrant a finding of total permanent disability.

(4) The Circuit Court of Appeals erred in affirming the action of the trial court in directing a verdict for defendant on the theory that any man who had lost the use of his right arm and his left eye, but was otherwise in good health, was, as a matter of law, not totally and permanently disabled.

V.

Summary of Argument.

(1) Subdivision 3 of Sect. 202 of the World War Veterans' Act, 1924, as amended, (38 U. S. C. 473) defining or declaring total permanent disability to include certain specific losses, among them the permanent loss of the use of a hand and an eye, is applicable to war risk insurance,

as shown by the legislative, administrative and judicial history of this provision and a consideration of the entire Act. (38 U. S. C. 473, quoted in part in Appendix, p. 27.)

(2) Regulation 3140 is within the power and authority of the Administrator of Veterans' Affairs, formerly the Director of the Veterans' Bureau, to issue, either under 38 U. S. C. 473, or independently of this section under general powers and authority conferred on the Director of the Veterans' Bureau and transferred to the Administrator.

(3) There was evidence before the jury upon which a verdict for petitioner might properly be found, and petitioner has been deprived of his constitutional right of trial by jury.

VI.

ARGUMENT.

(1) Application of 38 U. S. C., Section 473.

The legislative, administrative and judicial history of veteran legislation, and particularly subdivision 3, Sect. 202, World War Veterans' Act, 1924, as amended (38 U. S. C., Sect. 473) shows that it was the purpose and intent of Congress that a definition of total permanent disability to include certain losses, among them the permanent loss of the use of a hand and an eye, as provided in 38 U. S. C. 473, apply to war risk insurance, or yearly renewable insurance, as well as compensation allowances.

The War Risk Insurance Act of 1917 provided for compensation under Article 3 and insurance under Article 4. Section 400 of Art. 4 of this Act states the purpose of granting insurance is to give greater protection against death and total disability than given under the article covering compensation. (See Appendix, p. 27.) It is both logical

and reasonable to conclude that Congress had in mind the same total disability for which compensation was provided, the only added condition being that such disability be permanent. Pursuant to authority given in the Act of 1917, Treasury Decision 20, Regulation 11, was issued March 9, 1918, declaring in its first paragraph:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability."

Here the Treasurer and the Director made no distinction between total disability for compensation and insurance.

It is proper to assume that Congress knew the interpretation given its statutes by its administrative officers. With this knowledge that total permanent disability for compensation and insurance were considered identical, Congress, on December 24, 1919, amended Section 302 of the Act of 1917, and provided:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month." (Effective as of Oct. 6, 1917, by Act approved Dec. 24, 1919, 41 Stat. 373.)

With knowledge that the Bureau construed total, permanent disability the same for compensation and insurance purposes, it is significant that Congress, in its amendatory Act of 1919, did not limit to compensation by express words the specific disabilities deemed total, permanent disabilities.

Congress having referred in the insurance article of the War Risk Insurance Act of 1917 to the article on compensation, and the Bureau having defined total, permanent disability under both articles as identical, it was needless for Congress, in the amendatory Act of 1919, to amend the insurance section and repeat there the specific disabilities deemed total permanent disability. It is significant, too, that Congress, in the above-quoted provision of its amendatory Act of 1919, used the identical phrase of the insurance section of the War Risk Insurance Act of 1917, to-wit: "total permanent disability," further showing it intended the same statutory disability for compensation and insurance.

On November 26, 1920, the Director issued Regulation 57, quoted in the Appendix, p. 27, expressly making the disabilities deemed by statute total permanent disabilities total permanent disabilities for both insurance and compensation. Later, on September 12, 1921, the Director issued Regulation 4, quoted in Appendix, p. 28, which was in this particular substantially the same as Regulation 57 above mentioned.

Likewise, the Bureau promptly issued converted Government life insurance policies carrying an express provision enumerating the same specific losses mentioned in the amendatory Act of December 24, 1919, and providing that they should be deemed total permanent disability. Such a provision has consistently and continuously been one of the express terms of the printed published policy from that early time until now, and is incorporated in some 600,000 policies in force. (See Telegram of Solicitor, Veterans' Administration, Appendix, p. 31, and respondent's Memorandum on the grant of petition for certiorari, p. 10.)

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Law*, 299 Fed. 61, said,

relative to interpretations of total permanent disability under war risk insurance:

> "Of course, no interpretation which is against reasonable common sense can be sustained. Nor can any be upheld which is in conflict with the declaration in the Amendment of December 24, 1919, 41 St. 373, 374, Sect. 302, being Comp. St. Ann. Supp. 1923, Sect. 514 (4), wherein Congress provided in effect that compensation shall be allowed if and while the disability is rated as total and permanent; provided, however, that the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> *U. S.* v. *Law,* 299 Fed. 61, 64 (2). Decided May 12, 1924.

While it is true that *Law* v. *U. S.* was reversed by the Supreme Court on a jurisdictional question January 5, 1925 (266/494), it has been cited by other courts as authority on other questions. Nevertheless, it shows an appellate court's construction and application of 38 U. S. C. 473.

With this decision outstanding, and necessarily with knowledge of the interpretation put by the Bureau in its published regulations and converted life policy on Section 302, subdivision 3, of the War Risk Insurance Act, as amended, Congress re-enacted and amended Section 302 of the War Risk Insurance Act in the World War Veterans' Act, approved June 7, 1924, as Section 202, without limiting the statutory disabilities of subdivision 3 to compensation. Had Congress intended to make the disabilities deemed by it total permanent disabilities applicable only to the compensation sections, it is but reasonable to conclude that it would have used some such expression as "for purposes of this section," or similar language, to note a limited application.

The amendatory Act of June 25, 1918, in amending Section 300 of the Act of 1917, so limited the amendatory provision relative to the presumption of sound health at the time of enlistment, thereby showing that Congress provided for express limitation when it so intended such limitation.

By Act approved March 4, 1925, paragraphs 6, 7, 9 and 10 of Section 202 of the World War Veterans' Act was amended, but paragraph 3 was not changed. By Act approved July 2, 1926, Section 202, par. 3 of the World War Veterans' Act of 1924 was amended to add another disability to those deemed total permanent disability, but no change was made in the form or wording of the section to show that it was not applicable to insurance as construed by the courts and the Bureau.

Regulation 3140, providing that the loss of the use of one hand and one eye shall be deemed total permanent disability under yearly renewable term insurance, is substantially the same in that particular as Regulations 57 and 4, heretofore cited. The opinion of the Circuit Court of Appeals in this case gives the date of issuance of this regulation as March 24, 1932. We were advised by letter from the Veterans' Administration, dated April 25, 1934, and signed by James T. Brady, Acting Solicitor, that this regulation was first issued in May, 1930. See Appendix, p. 30.

With knowledge of these regulations and the practice of the Bureau, Congress again, by Act approved July 3, 1930, amended the World War Veterans' Act. Section 202, subdivision 3, was amended, but the first paragraph in that subdivision, declaring certain disabilities total permanent disabilities, was re-enacted unchanged. Again Congress showed no dissatisfaction with the Director's interpretation of its statutes and purposes.

There is nothing in the many amendments to the War Risk Insurance Act and the World War Veterans' Act to show

that Congress did not approve of the Bureau's interpretation of total permanent disability for insurance purposes. But to the contrary, Congress has further shown its approval of the Bureau's interpretations of the Act and the regulations issued thereunder by having published, pursuant to Senate concurrent resolution 29, adopted June 27, 1932, a compilation of the Federal laws relating to veterans of wars of the United States, with explanatory notes and annotations. The compilation so published was furnished to the Senate pursuant to a resolution dated January 21, 1931, as follows:

> "Resolved, That the Administrator of Veterans' Affairs is requested to prepare and transmit to the Senate, in form suitable to be printed, a codification of all Federal laws relating to the veterans of our various wars, which codification shall contain (1) appropriate explanatory notes and annotations to each section of such codification and (2) suitable headings, reference tables, and indices, for the purpose of making available a clear and *complete statement of all the rights and privileges of such veterans.*" (Italics ours.)

On page 257 of this compilation designated Senate Document No. 131 appears provision 20 of the Government converted policy, making the same disabilities specified in Sect. 473, Title 38 U. S. C., total permanent disabilities under the insurance contract. And also on page 274 of this compilation is the following:

> "Statutory total permanent disabilities.—The statutory total permanent disabilities as included in subparagraph 3, Section 202, World War Veterans' Act, dealing with compensation, are here set forth as statutory total permanent disabilities for insurance (R. & P. 3122). (See also R. & P. 3140.)"

The resolutions above cited and quoted may be found on pages V, IX and XI of the compilation published by the Government Printing Office August 1, 1932, as Senate Document

131 and entitled "Federal Laws Relating to Veterans of Wars of the United States (Annotated)."

Two Circuit Courts of Appeals have definitely approved the application of 38 U. S. C., Sect. 473, to war risk insurance.

The Circuit Court of Appeals for the Ninth Circuit clearly considered Section 202, World War Veterans' Act (38 U. S. C., Sect. 473) applicable to war risk insurance:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work for short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans' Act, 1924, Sect. 202, as amended (38 U. S. C. A., Sect. 473), and its regulations. To be sure, he may not claim total disability merely upon the ground that he is no longer able to engage in farming, yet if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."
>
> *U. S.* v. *Rasar*, 45 F. (2d) 545, 548 (C. C. A. 9).

The same reiterated:

Sorvik v. *U. S.*, 52 F. (2d) 406, 411 (C. C. A. 9).

See also:

U. S. v. *Law*, 299 Fed. 61, 64 (2).

The decision in *U. S.* v. *Cole*, 45 F. (2d) 339, is an inferential holding that Regulation 4 and Sect. 473, U. S. C. A., Title 38, are part of the war risk insurance contract, and the insured would be entitled to the total disability benefits if he had proved that he lost the sight of both eyes while the policy was in force.

Both compensation and insurance are provided for by the same Act. Both protest against total permanent disability. The Act nowhere undertakes to define total per-

manent disability other than in 38 U. S. C. 473. In the absence of express restriction, it is to be assumed that the term "total permanent disability" is used throughout the statute in the sense first defined.

Rampanga Sugar Mills v. *Trinidad,* 279 U. S. 211, 73 L. Ed. 665 (2).

The foregoing legislative, judicial and administrative history of 38 U. S. C. Sect. 473, shows it was the intent of Congress that the instances of total permanent disability there specified should apply to war risk insurance.

Corsicana Nat. Bank v. *Johnson,* 251 U. S. 68, 83;
U. S. v. *Bailey,* 9 Peters, 238, 256, 11 Curtis 341, 345;
Swigart v. *Baker,* 229 U. S. 187;
U. S. v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466, 77 L. Ed. 893, 898.

(2) Regulation 3140 Authorized and Binding on Government and Insured.

If 38 U. S. C. 473 is applicable to war risk insurance, it follows necessarily that Regulation 3140 is authorized.

Further, we submit that independently of whether Section 473, Title 38, U. S. C., is construed as within itself authorizing that total permanent disability under insurance contracts, as well as under compensation provisions, shall include the specific instances therein mentioned, Regulation 3140 and similar prior regulations are valid and within the broad powers of the Director of the Veterans' Bureau, now the Administrator of Veterans' Affairs, consistent with the act granting war risk insurance, and correctly interpret the purposes and intent of Congress.

House Report 130, 65th Congress, reporting on the bill that became the War Risk Insurance Act of 1917, shows that one of the controlling purposes of the War Risk Insurance Act was to afford the soldier the opportunity to

carry insurance against death and permanent total disability on a parity with persons not engaged in war service, the rate to the soldier to be the peace-time rate, the Government to take care of the expense of the extra hazard of military service. Certainly, Congress intended that war risk insurance should be as liberal in its terms, conditions and provisions, and as protective in its scope, as any similar policies issued in civil life. We think this Court may take judicial notice of the fact that policies of insurance companies quite generally carry a provision making the loss of both feet, or both hands, or both eyes, or a hand and an eye, total permanent disability under the policy. Certainly, a regulation that affords equal protection and advantages is in accord with the purposes of Congress.

Another purpose of Congress in granting war risk insurance was to obviate the necessity for future pension legislation as had been enacted in the past.

We do not contend that the Director of the Veterans' Bureau can amend, modify or enlarge the statutes of Congress; but we do contend that it is the power and duty of the Director, now Administrator of Veterans' Affairs, to interpret the statutes, determine the purposes of Veterans' legislation, and supplement the statutes by regulations to make clear the purposes of such legislation and the rights and liabilities of the insured and the Government thereunder.

Relevant parts of Section 13 of the War Risk Insurance Act approved October 6, 1917, provide:

> "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising

under the Act, except as otherwise provided in sections five and four hundred and five. * * * The director shall adopt reasonable and proper rules * * * to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act * * *."

The relevant parts of Section 402 of the same Act of 1917 provide:

"That the director, subject to the general direction of the Secretary of the Treasury, shall determine upon and publish the full and exact terms and conditions of such contract of insurance * * *. Provision for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. * * *"

Under this authority Treasury Decision 20 W. R. was issued, interpreting total permanent disability for insurance and compensation the same. And later, under the same authority, Regulation 57 was issued, placing certain specific losses, including the permanent loss of the use of a hand and an eye, within the term "total permanent disability," both for compensation and insurance.

With knowledge of these regulations, by the Act approved August 9, 1921, Congress created the office of Director of the Veterans' Bureau, and thereby gave and transferred to him the same power and authority theretofore conferred on the Director of the Bureau of War Risk Insurance. Nothing in this Act shows any disapproval of the former

Director's interpretation of the intent and purpose of Congress given in the regulations issued. Thereafter the Director of the Veterans' Bureau issued Regulation 4, to the same effect as old Regulation 57.

With knowledge of the Bureau's regulations, Congress, in the World War Veterans Act, reaffirmed its power to issue regulations in much the same language as the original Act, without showing the slightest disapproval of the regulations issued.

The relevant part of Section 5 of this Act of 1924 is as follows:

> "The director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act and all decisions of questions of fact affecting any claimant to the benefits of Titles II, III, or IV, of this Act, shall be conclusive except as otherwise provided herein. * * * The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training or maintenance and support allowance provided for in this Act * * *."

By Act approved March 4, 1925, Section 301 of the World War Veterans' Act, 1924, was amended, and a provision of the original War Risk Insurance Act omitted from the Act of 1924 was inserted, to-wit:

> "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage

of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

No disapproval of the Bureau's regulations cited is shown here.

Congress again amended Sect. 301 of the World War Veterans' Act by Act approved June 2, 1926, but retained the provisions of that section inserted by the Amendment of March 4, 1925, above quoted, and showed no disapproval in this Amendment of the regulations theretofore issued; and again, by Act approved May 29, 1928, amended Sect. 301 of the World War Veterans' Act, and continued the powers theretofore given the Director without disapproval of the regulations issued.

The Director of the Veterans' Bureau then issued Regulation 3140, as we are advised, in May, 1930.

With knowledge of these regulations and the Bureau's interpretation of the laws granting insurance and the purposes of Congress, by Act approved July 3, 1930, Congress again amended the World War Veterans' Act, Section 5, prescribing the general powers of the director, to make his decisions on questions of law, as well as of fact, conclusive, except as otherwise provided in the Act. (See 38 U. S. C. A., 426, 1933 Cumulative Supplement.)

Likewise, by this same Act of July 3, 1930, Section 301, paragraph 3, of the World War Veterans' Act was amended, but authority to make such other provisions from time to time, by regulation, for the protection and advantage of the insured, as may be found to be reasonable and practicable, was retained.

By another Act adopted the same date, July 3, 1930, the Veterans' Administration was provided for, and all the power and authority of the Director of the United States Veterans' Bureau was conferred and vested in the admin-

istrator of Veterans' Affairs; and nothing is shown in this Act as disapproving the regulations of the Director.

Likewise, with knowledge of the Bureau's interpretation of the term "total permanent disability," contained in Sect. 400 of the War Risk Insurance Act of 1917, this general term was retained in Sect. 300 of the World War Veterans' Act, 1924, and the subsequent Acts of March 4, 1925, (43 Stat. at L. 1302, 1308); July 2, 1926, (44 Stat. at L. 790, 798); and May 29, 1928, (45 Stat. at L. 964, 967), amending and re-enacting this section without change or limitation to show disapproval of the Bureau's interpretation.

The Veterans' Bureau has interpreted and construed veteran legislation providing for insurance in accordance with the regulations here discussed for a period of nearly fourteen years. Clearly, the interpretations placed upon veteran legislation by the Director of the Veterans' Bureau, and the regulations issued pursuant thereto, have received legislative sanction and should not be overturned.

See:

United States v. *John Bailey*, 9 Peters 238, 256, 11 Curtis 341, 345;

Johnson v. *Manhattan R. Co.*, 289 U. S. 479, 500, 77 L. Ed. 1331, 1346;

National Lead Co. v. *U. S.*, 252 U. S. 140, 146, 64 L. Ed. 496, 499, 500.

See also decisions of this Court cited on page 13.

Authorized regulations relative to war risk insurance form part of the contract, and are binding on both the Government and the insured. They have the force of law and are binding on the courts.

White v. *U. S.*, 270 U. S. 175, 70 L. Ed. 530;

U. S. v. *Cole*, 45 F. (2d) 339 (C. C. A. 6);

Ross v. *U. S.*, 49 F. (2d) 541 (C. C. A. 5);

Bartee v. *U. S.*, 60 F. (2d) 247 (1) (C. C. A. 6).

The amendment to Regulation No. 1115, quoted by the Circuit Court of Appeals as the regulation itself, and Regulation 3205, quoted in the Appendix to respondent's memorandum to this Court, do not militate against the conclusion that the Veterans' Bureau, now Veterans' Administration, has properly applied statutory disabilities to war risk and converted insurance and that its action has received legislative sanction. (Regulation 1115, quoted in Appendix, p. 32.) We base this asertion on the following reasons:

(a) Congress, in declaring that the specific losses enumerated shall be deemed total permanent disability, did not fix any standard by which such disability shall be so deemed to result, but declared total permanent disability to so result without qualification or limitation, and left to the Bureau no discretion but merely the duty to find whether or not the claimant has suffered the specific losses mentioned. Whereas, in providing compensation for other disabilities, up to and including total permanent disability, other than statutory, Congress did fix a standard by which the administrative agency should measure the disabilities found, which was the impairment in earning capacity, resulting from such injury to the average man, in civil occupations.

(b) The Veterans' Administration has retained Regulations 3122 and 3140 expressly making the statutory total permanent disabilities total permanent disability under insurance contracts, which demonstrates that there has been no departure from the Bureau's interpretation of the statute, adhered to through these many years as far as the statutory disabilities are concerned. The modification in the regulations clearly affects only those cases in which the Veterans' Bureau, now Veterans' Administration, is left to determine the effect of diseases or losses suffered other than those declared by Congress to constitute total

permanent disability, as they are the only class of cases in which a standard is provided for the Bureau in determining the existence of total permanent disability.

(c) The regulations and the express terms of the published life policy, insofar as they declare the specific disabilities enumerated in the amendatory Act of December, 1919, and subsequent Acts, total permanent disability under insurance contracts, have never been disapproved by any court prior to the instant case, so far as we have been able to find, but, to the contrary, have received judicial sanction.

(3) **Sufficiency of the Evidence.**

The evidence and the fair inferences therefrom show:

Petitioner lost his right arm above the elbow on October 26, 1918, during which time his insurance was of force by payment of premiums. At the same time he had only one-tenth vision in his left eye and could see only the outline of large objects. His eye condition could not then be corrected. He had lost the use of his left eye. (See *Pan-American Life Insurance* v. *Terrell*, 29 F. (2d) 460 (C. C. A. 5), and cases there cited so holding.)

He was right-handed before he lost his right arm. He is not a highly educated man, having gone only as far as the third year in high school. He could not follow his former employment because of his disabilities. He gave up his training course on advertising because his health got bad. The jobs he procured were given him out of sympathy and were of a temporary nature, or given him on a commission basis, or on a basis the employer was to pay him whatever he might determine he was worth. The jobs to which there was any fixed remuneration attached he had to give up because of his disabilities. He has no talent for sales jobs

and could not make anything at such work. He tried diligently to get other employment, but could not, in competition with others who had two hands and two good eyes. By his efforts over a period of years he was able to make only $405. The loss of an eye and an arm on opposite sides of the body is much more disabling than the loss of an eye and an arm on the same side of the body. Because of the difficulty of co-ordination between an eye and a hand on opposite sides, the medical witness testified, in his opinion petitioner was totally disabled.

Certainly this is substantial evidence to prove him totally disabled, which was the only issue in the case. Is there any better evidence that a man is unable to follow a substantially gainful occupation than the proof that he tried various jobs and lost them because of his handicap? Can there be more definite proof that a man is unable to obtain employment in competition with others than diligent effort to obtain employment over a period of years and failure because of his disabilities? Is there more effective proof that a man is disabled to follow a gainful occupation than the proof of trial over a period of years resulting in the meager earnings of $405 in more than fourteen years? Is it not indulging in pure speculation in behalf of defendant for the court to say, under the evidence, that this man is able in spite of his disabilities to follow substantially gainful employment?

The ability to get employment, as well as the ability to do the required work after employment, is an important factor in determining whether one is totally disabled.

> "Evidence that insured suffered from recurrent skin disease, which rendered him unable, because of his appearance, to obtain employment, sustained finding of total permanent disability under war-risk policy."
>
> *United States* v. *Raues*, 48 F. (2d) 582 (2).

> "Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of sound mind and average attainments under the usual conditions of life."
>
> *United States* v. *Cox*, 24 F. (2d) 944, 946.

This Court held in *Gunning* v. *Cooley*, 281 U. S. 90, in determining a motion of either party for a peremptory instruction, the court assumes that the evidence of the opposing party proved all that it may reasonably be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them, and that the credibility of witnesses and the weight to be given to their testimony are for the jury.

From an examination of the opinion of the Circuit Court of Appeals in this case it is apparent that the court did not draw, in favor of petitioner, all the inferences fairly deductible from the facts proven. The Circuit Court of Appeals apparently disregarded the eye disability and considered it of no handicap. The court was apparently determining the credibility of the witness rather than the fair inferences from the facts proven as to the disability resulting. The court apparently determined the weight to be given to the witnesses' testimony in the light of the circumstance that the eye had been defective from birth. However, we submit that the evidence does not show that the insured's eye was as totally defective at birth as it was at the time of his injury in October, 1918. This Court may take judicial notice of the fact that persons are not admitted to the Army when one eye is so defective, and from this it is presumable that petitioner's eye was not so defective even in 1917, when he enlisted.

Likewise, the Circuit Court of Appeals, in determining the effect of the eye deficiency, disregarded the medical

testimony as to the increased difficulty of directing the work of a hand on the opposite side from the eye. Further, the Circuit Court of Appeals determined the credibility of petitioner's testimony that he tried diligently to get employment but could not in competition with others with two good hands and two good eyes as shown from the statement in the opinion: "Having no dependents and $90 a month compensation, he was under no necessity to work." There is no evidence in the record to show whether or not petitioner had dependents, and we are at a loss to understand how the Circuit Court of Appeals so concluded. As a matter of fact, petitioner was married and had a wife dependent on him.

The circumstance of long delay before bringing suit unexplained may, in some cases, affect the credibility of insured's testimony; but this is a matter for the jury. To make it controlling would be to defeat by rule of evidence the limitation period fixed by Congress.

However, while through inadvertence, plaintiff's explanation of his delay was omitted from the brief of evidence, he did in fact explain his delay. He was asked the question, why he did not make application for disability benefits until some time in 1931; and he answered that it was attributable more to ignorance than anything else; that he thought a man had to die to get that insurance; that he thought it was straight life insurance.

In view of the tremendous weight given by this Court in the case of *Lumbra* v. *United States,* 290 U. S. 551, to the failure to explain the long delay in claiming the insurance benefits, and to correct as far as possible an inadvertence on our part, we have asked the District Attorney to certify to the question and the answer of the insured on this particular point, which the District Attorney very promptly did, and his certificate appears in the Appendix on page 33.

When it is remembered that in the case of yearly renewable insurance no policy was issued to the insured, and the average insured had little opportunity to know the law and practically no opportunity to know the regulations which constituted his policy, as these were not published in form available for the general public, it is not surprising that many veterans were ignorant of their rights for a long time and took no action to protect them. Certainly, Congress considered there were meritorious claims that had not been presented and good reason for delay when it extended the time for making claim and bringing suit.

Pure ignorance of his rights under the contract and the law accounts for the delay in this case.

The trial court accepted as proven the loss of the use of the left eye and the right arm. There was no suggestion at the trial of the case that the insured had not lost the use of his eye to the extent testified—the time of the loss was the factor urged. The view that the eye loss did not handicap was first urged and given credence in the appellate court, when, construing the evidence most liberally in favor of the Government, contrary to the established rule in such cases, it was concluded that the eye deficiency had existed always and had never handicapped plaintiff.

This Court may take judicial notice of the scientific fact, established by experience in the examination of thousands of school children, that a person may be entirely ignorant of the existence of a severe eye deficiency, and that the deficiency was in fact a serious handicap, and when corrected the person's work promptly and materially improved. Even proof that the eye was defective always does not prove that it did not handicap. Further, the insured was right-handed before his injury; naturally, his right arm and hand were the primary working members, and the left hand the secondary assistant. The right eye directed the

work of the right arm, which normally was mostly in the field of vision of the right eye. However, when the left hand and arm were called upon to do the entire work, much of it must be done out of the normal field of vision, or in a less efficient area of the normal field of vision of the right eye, and, naturally, there is a serious increase in the handicap.

Common sense supports the testimony of the eye specialist, and certainly he is the person best fitted to testify as to the co-ordination between eye and muscles and the control of the eye over the arms and hands, and the handicap resulting from the loss of that co-ordination and control. It is his opinion that the insured in this case is totally disabled and was so in October, 1918.

Certainly Miller had lost the use of his left eye within the meaning of the insurance contract and the statute. It was clearly of no practical value in the performance of work for compensation, and undoubtedly a complete loss so far as earning capacity is concerned, which is really the test of usefulness or loss in these cases.

We submit that there is no such thing as judicial notice that a one-eyed one-armed man is not totally and permanently disabled. If the court is to look to its own observations as to one-armed one-eyed men at work, we ask the court with all sincerity whether it can say such men gain their places in competition with others as a gratuity from some close sympathetic friend or relative; can it say whether such men it may know were of limited training and capability on a parity with this man, or are they men who have peculiar and exceptional talent or genius? Because men with one eye and one hand have been known to work and exist does not prove that they were substantially employed. Most likely they were employed for a mere pittance and their earnings augmented by the charitable dona-

tions of relatives or friends. We do know it is unreasonable that men will employ one so disabled when there are, always have been, and always will be men with two good arms and two good eyes seeking work, except it be as a gratuity to help a close friend or relative, or the man has some peculiar talent in which his worth lies that is not impaired by his dismemberment. The fair inference from the evidence is that this man possesses no such talent.

We submit that under the evidence in this case a jury could have properly found a verdict for petitioner, and that he has been deprived of his constitutional right of a jury trial.

Respectfully submitted,

WALLACE MILLER,
JAS. A. LOWREY, JR.,
F. L. CLEMENTS,
Attorneys for Petitioner.

APPENDIX.

Section 400, War Risk Insurance Act of 1917.

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums hereinafter provided.

38 U. S. C., Sect. 473—Relevant part:

Disability resulting from injury; total and permanent disability; loss of both eyes; loss of use of both eyes and one or more limbs; tubercular ex-service men. If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: Provided, however, That the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability: Provided further, That the compensation for the loss of the use of both eyes shall be $150 per month, and that compensation for the loss of the use of both eyes and one or more limbs shall be $200 per month: Provided further, That for double total permanent disability the rate of compensation shall be $200 per month.

War Risk Regulation 57—Relevant parts:

IV. For compensation purposes a disability from injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz: "Loss of both feet or both

hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously any substantially gainful occupation and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

(c) When a presumption of total permanent disability is established under the following conditions: * * *

VII. Upon a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with provisions of Paragraph IV above. Such awards may be made retroactive to the date of the commencement of such total permanent disability if the case falls within the provisions of subparagraph (a) or (b) of Paragraph IV above, or to the date of the commencement of the period during which the person is presumed to be permanently and totally disabled if the case falls within subparagraph (c) of Paragraph IV above.

Awards of total permanent disability under the contract of converted insurance shall be governed by the terms and conditions of the converted policy.

IX. Regulation 54 is hereby revoked and all other bulletins, Treasury decisions, or regulations in conflict with this regulation are modified accordingly.

United States Veterans' Bureau Regulation No. 4, Division B:

IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(a) When a statutory total permanent disability entitles a person to such rating, viz, "Loss of both feet or both

hands or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden."

(b) When from the evidence submitted it is determined that a person has suffered an impairment of mind or body of a degree which would render the average man incapable of following continuously a substantially gainful occupation, and it furthermore appears reasonably certain that such degree of disability will continue throughout the life of the disabled person.

VII. On a properly supported claim, awards of total permanent disability for yearly renewable term insurance purposes and for automatic insurance purposes may be made in accordance with the provisions of Paragraph IV above. Such awards shall be made retroactive to the date of commencement of such total permanent disability if the case falls within the provisions of said paragraph.

X. Bureau of War Risk Insurance Regulation 57 is hereby revoked and all other bulletins, Treasury decisions or regulations in conflict with this regulation are modified accordingly.

Regulation 3122:

Statutory total permanent disabilities. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under United States Government life insurance; and monthly installments of insurance for any of these specifically enumerated cases of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Veterans' Administration Letter:

Washington, April 25, 1934.

In Reply Refer to: CC-A.

Mr. Jas. A. Lowrey, Jr.,
c/o Miller & Lowrey,
Attorneys at Law,
Macon, Georgia.

DEAR SIR:

Your letter dated April 13, 1934, addressed to Mr. E. Julian Peacock, Clerk, Committee on Naval Affairs, House of Representatives, Washington, D. C., relative to your desire to secure a compilation of the regulations of the Veterans' Administration, and if there is no such printed compilation, then requesting specific information relative to the effective date of Paragraph R-3140, Regulations and Procedure, Veterans' Administration, has been referred by Honorable Carl Vinson, House of Representatives, Washington, D. C., to this Administration for attention.

The Regulations and Procedure of the Veterans' Administration is a loose-leaf compilation consisting of sections pertaining to Adjudication, Adjusted Compensation, Finance, Supply, Insurance, Legal, Medical, etc. Only sufficient copies of this loose-leaf compilation were printed to meet the needs of the employees of the Veterans' Administration, except copies have been furnished to other Federal agencies and to accredited representatives of recognized veterans' and welfare organizations. This loose-leaf compilation is not published as a public document and cannot be purchased.

Paragraph 3140 of Regulations and Procedure was first incorporated in this loose-leaf compilation at the time it was originally prepared and when distributed in May, 1930, was accompanied by a memorandum over the signature of the then Director of the United States Veterans' Bureau containing the statement: "This Insurance portion amends and supersedes all other Regulations, General Orders, Circulars, and other instructions issued prior to March, 1930, as conflict therewith wholly or in part." The language that

was incorporated in this Paragraph R-3140 was taken from the insurance policy contract.

Public No. 90, 65th Congress, approved October 6, 1917, contained a provision in Section 302, "That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month." This provision has been modified from time to time until these statutory permanent total disabilities are those listed in the paragraph above referred to. While said statutory permanent and total disabilities as contained in the law are with reference to the payment of compensation, the Veterans' Administration adopted the policy of making these same disabilities the basis of awarding insurance for permanent and total disability for both term insurance and converted insurance purposes. In the World War Veterans' Act, 1924, as amended, the provision for statutory permanent and total disabilities is contained in Section 202 (3). As stated above this provision first appeared in the Act of October 6, 1917, and has been amended by amendatory Acts dated June 25, 1918, August 6, 1919, December 24, 1919, June 7, 1924, and July 2, 1926.

It is noted you have a copy of Senate Document No. 131, 72nd Congress, 1st Session, "Federal Laws Relating to Veterans of Wars of the United States," already in your possession. On page 132 thereof under Section 463 you will find a historical note relative to Section 202 (3) of the World War Veterans' Act, 1924, as amended.

Yours very truly,

JAMES T. BRADY,
Acting Solicitor.

Telegram of Solicitor, Veterans' Administration:

1934 Dec 19 PM 12 46

QB198 71 Govt—Washington DC 19 1217P

Miller & Lowrey
Attorneys Macon Ga

Re tel to Honorable Carl Vinson from March eighteen nineteen nineteen date Treasury Decision four two War

Risk Government life insurance policies contained provisions for maturity as total and permanent disability claim if insured suffered entire and irrecoverable loss of sight of both eyes and other specific disabilities stop Changes were made in policies from time to time to conform with changes in law defining said specific disabilities as total and permanent.

Brady Solicitor

Regulation 1115:

Permanent Total Ratings for Compensation Purposes.

1115. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:

(A) *Statutory.*—When a statutory permanent total disability entitles a person to such rating, viz: "Loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden."

(B) *When Shown by Evidence.*—When from the evidence submitted it is determined that there is present any impairment of mind or body which continuously renders it impossible for the average man to follow any occupation similar to that of the disabled veteran at the time of enlistment and which is founded upon conditions which render it reasonably certain that it will continue throughout the lifetime of the person suffering from it. The impairment in earning capacity in each individual case will not be considered so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. In arriving at a decision the average impairment in ability to secure employment, which results from the service connection injuries, will be considered.

Furthermore permanent and total disability may be conceded in a proper case where there are present two or more

disabilities, affecting entirely different functions, one of which is 65 per cent disabling and which combined by present methods to 85 per cent. These evaluations, however, upon which permanent and total disability may be conceded are not intended to be rigid unalterable standards. They are cited as illustrative and to be used as guides.

A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa. (March 2, 1931.)

Regulation 3140:

Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

Certificate of District Attorney:

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 342.

MADISON L. MILLER, JR., Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

I, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, do certify that the above-captioned case

was tried in the District Court of the United States for the Middle District of Georgia at Macon, before Judge Bascom S. Deaver and a jury, on the 10th day of July, 1933. The evidence adduced at the trial was taken down stenographically by Mr. Alton L. Watson, a court reporter employed by the Government.

The trial resulted in a directed verdict for the Government. Plaintiff applied for and obtained an order authorizing the prosecution of an appeal *in forma pauperis*. The evidence adduced at the trial was not written out, for the reason given by plaintiff's counsel that plaintiff did not have the money to pay for a transcript of the evidence. The brief of evidence incorporated in the bill of exceptions was prepared by plaintiff's counsel from their recollection of the testimony.

At the trial of the case, as shown by the stenographic notes of Reporter Alton L. Watson, counsel for plaintiff propounded to plaintiff the following questions:

> "Q. Why is it you did not file any application for disability benefits until some time in 1931, I believe it was?
>
> "A. That is attributed more to ignorance than anything else. I thought a man had to die to get that insurance."
>
> "Q. You thought he had to die?
>
> "A. Yes, sir, I thought it was straight life insurance."

This certificate is given at the request of plaintiff's counsel for the purpose of being embodied in the Appendix to the brief of counsel for Madison L. Miller, Jr., in the Supreme Court of the United States, subject, however to the approval of the Solicitor-General of the United States or other counsel representing the Government in said case in the Supreme Court of the United States.

This December 21, 1934.

T. Hoyt Davis,
United States Attorney.